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SOUTHERN DISTRICT OF CALIFORNIA
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THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RODNEY M. TOOTHACRE Plaintiff, v. UNITED STATES OF AMERICA and INTERNAL REVENUE SERVICE, Defendant.	Case No: 07-CV-2289-DMS-WMC **OPPOSITION TO MOTION TO DISMISS** **Hearing Date:** **May 16, 2008** **Time:** **1:30 pm** **Courtroom:** **10**

TABLE OF CONTENTS

PAGE(S)

I. INTRODUCTION 1

II. LEGAL STANDARDS 1

A. Standards Regarding Motion to Dismiss Pursuant to Rule 12(b)(6) 1

B. Standards When Ruling On Motion to Dismiss Pursuant to Rule 12(b)(1) 2

III. FACTUAL BACKGROUND 2

IV PROCEDURAL HISTORY 9

V ARGUMENT 9

A. This Court Has Subject Matter Jurisdiction Because Plaintiff Exhausted His Administrative Remedies by Providing Defendants With Notice Pursuant to 28 USC § 2675(a) 9

B. Plaintiff States A Valid Claim Upon Which Relief Can be Granted Under 26 U.S.C. § 7432 10

C. Plaintiff States A Valid Claim Upon Which Relief Can be Granted Under 26 U.S.C. § 7433 11

VI. CONCLUSION 12

TABLE OF AUTHORITIES

PAGE(S)

CASES

Beliveau v. Caras
(CD CA 1995) 873 F.Supp. 1393 1

Big Bear Lodging Ass'n v. Snow Summit, Inc.,
(9th Cir. 1999) 182 F.3d 1096 1

College v. Brazos County, Texas
(5th Cir. 1993) 981 F2d 237 1

Conely v. Gibson,
355 U.S. 41, 45-46 (1957) 2

Jerves v. United States
(9th Cir. 1992) 966 F2d 517 9

Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.
(5th Cir. 1993) 981 F2d 1045 1

Kokkonen v. Guardian Life Ins. Co. of America
(1994) 511 US 375, 114 S.Ct. 1673 2

Levine v. Diamanthuset, Inc.
(9th Cir. 1991) 950 F2d 1478 1

McCalden v. California Library Ass'n
(9th Cir. 1990) 955 F2d 1214 1

Parks School of Business, Inc. v. Symington
(9th Cir. 1995) 51 F3d 1480 2

Shnipek v. United States
(9th Cir. 1985) 752 F2d 1352 9

Williamson v. Gen. Dynamics Corp.,
(9th Cir. 2000) 208 F.3d 1144 1

TABLE OF AUTHORITIES-Continued

PAGE(S)

STATUTES

Treas. Reg. § 301.7433-1(b)(1)........ 11
Treas. Reg. § 301-7433-1(c)(1)........ 11, 12

IRC § 63215(f)........ 7
IRC § 7433........ 3

25 C.F.R. § 301.6325........ 3

26 U.S.C. § 6325........ 2
26 U.S.C. § 7432........ 2, 4, 10-12
26 U.S.C. § 7433........ 2-4, 10, 11

28 U.S.C. § 451........ 2
28 U.S.C. § 1331........ 3
28 U.S.C. § 1346........ 9
28 U.S.C. § 1357........ 3
28 U.S.C. § 1361........ 3
28 U.S.C. § 1391(e)........ 3
28 U.S.C. § 2671-80........ 9

I

INTRODUCTION

Defendants United States of America and Internal Revenue Service have filed a motion to dismiss plaintiff's claims pursuant to Rule 12(b)(1) [lack of subject matter jurisdiction] and Rule 12(b)(6) [failure to state a claim].

Essentially defendants erroneously assert that plaintiff failed to exhaust administrative remedies and therefore this Court lacks subject matter jurisdiction over the claim. Defendants fall-back position is that even if plaintiff exhausted his administrative remedies, which he did, then the complaint fails to state a cause of action upon which relief can be granted.

As will be unequivocally established herein, plaintiff exhausted his administrative remedies and otherwise states valid claims upon which relief may be granted.

II

LEGAL STANDARDS

A. Standards Regarding Motion to Dismiss Pursuant to Rule 12(b)(6)

Many courts view Rule 12(b)(6) motions with "disfavor" because of the lessor role pleadings play in federal practice and because of the liberal practice and policy regarding amendments. "The motion to dismiss for failure to state a claim is viewed with disfavor and is *rarely* granted." [*Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.* (5th Cir. 1993) 981 F2d 1045, 1050; *College v. Brazos County, Texas* (5th Cir. 1993) 981 F2d 237, 243.]

Unless the court converts the Rule 12(b)(6) motion into a summary judgment motion, the court cannot consider material outside the complaint (e.g., facts presented in briefs, affidavits or discovery materials). [*Levine v. Diamanthuset, Inc.* (9th Cir. 1991) 950 F2d 1478, 1483; *McCalden v. California Library Ass'n* (9th Cir. 1990) 955 F2d 1214, 1219; *Beliveau v. Caras* (CD CA 1995) 873 F.Supp. 1393, 1395.]

Under Rule 12(b)(6) dismissal is **only** appropriate when it is clear that no relief could be granted under **any** set of facts that could be proven consistent with the allegations set forth in the complaint. [*Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999). Dismissal is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." [*Conely v. Gibson*, 355 U.S. 41, 45-46 (1957).

Finally, in ruling on a motion to dismiss pursuant to Rule 12(b)(6), all allegations in the complaint are to be viewed in the light most favorable to the non-moving party and all material allegations must be accepted as true. [*Parks School of Business, Inc. v. Symington* (9th Cir. 1995) 51 F3d 1480, 1484]

B. Standards When Ruling On Motion to Dismiss Pursuant to Rule 12(b)(1)

Pursuant of Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss a claim on grounds that the Court lacks subject matter jurisdiction. When a defendant has filed such a motion the plaintiff always has the burden of establishing subject matter jurisdiction. In effect, the Court presumes lack of jurisdiction until plaintiff proves otherwise. [*Kokkonen v. Guardian Life Ins. Co. of America* (1994) 511 US 375, 114 S.Ct. 1673, 1675.

III

FACTUAL BACKGROUND

This is an action brought under 26 U.S.C. § 7433 for minimum statutory damages of $100,000.00 plus fees and costs for illegal Internal Revenue Service liens on real property of Toothacre. Plaintiff Toothacre should be entitled to the increase in damages by $1,000.00 per day for each day that the liens remained in place after the filing of this lawsuit and notice to the defendants.

26 U.S.C. § 7432 - Civil damages for failure to release lien states:

> (a) In general if any officer or employee of the Internal Revenue Service knowingly or by reason of negligence, fails to release a lien under 6325 on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 6325 - Release of lien or discharge of property provides:

> (a) Release of lien subject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which - (1) Liability is satisfied or unenforceable or the Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable.

///

The regulations that the Secretary has prescribed are 25 C.F.R. § 301.6325 - Release of lien or discharge of property:

> (a) Release of lien – (1) Liability satisfied or unenforceable. Any district director may issue a certificate of release of a lien imposed with respect to any internal revenue tax, whenever he finds that the entire liability for the tax has...become unenforceable as a matter of law (and not merely uncollectible or unenforceable as a matter of fact).

26 U.S.C. § 7433 - Civil damages for certain unauthorized collection actions:

> (a) In general
>
> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.
>
> (b) Damages
>
> In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of——
> (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and
> (2) the costs of the action.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 as this action involves federal statutes and defendants are federal agencies; IRC 7433, FRCivP 65, 28 U.S.C. §§ 451, 1331, 1357, 1361, and 1391(e). Injunction is authorized under IRS Section 6331 (i) (4) (b). [Complaint ¶ 3.]

The Internal Revenue Service (IRS) has illegally placed Notices of Federal Tax Liens (NFTLs) on plaintiff's home in Poway, California. These liens prevented the successful closing of a refinance escrow, causing immense financial problems for Toothacre. Toothacre was trying to use some of the proceeds of the refinancing of the home in order to become compliant with all of the taxes he does not dispute and also to replace the roof on the home and make other necessary repairs. Toothacre made many good faith efforts to reach a compromise with the defendant but the defendant refused and continues to refuse to negotiate in good faith. The illegal actions of the IRS prevented the closing of the refinance escrow and to this very day it has not closed, even though a major portion of the funds were to go to the IRS for tax years not disputed. [Complaint ¶ 5]

Plaintiff filed with the Internal Revenue Service a NOTICE OF INTENT TO SUE THE UNITED STATES OF AMERICA. That notice was dated April 6, 2006. By letter dated November 7, 2007, approximately one and one half years later, the IRS denied Plaintiff's Administrative Claim for Damages under 26 U.S.C. §§ 7432, 7433, Civil Damages for Failure to Release Lien, dated May 16, 2006. (sic) [Complaint ¶ 6]

More than 10 years ago, the IRS made an assessment against Rodney M. and Marcia L. Toothacre (now deceased) for tax years 1993 and 1994. Toothacre did not contest the assessments. On February 4, 1997, the IRS filed the Notice of Federal Tax Liens (NFTLs) for the unpaid assessments of those ancient years. [Complaint ¶ 7]

After 10 years, by law, under the Statue of Limitations, the federal liens expired. Federal Tax Liens self extinguished after 10 years. The liens were gone, finished, over with and extinguished. Additionally the Internal Revenue Service voluntarily issued Certificates of Release of Liens for tax years 1993 and 1994. The IRS NFTL Form (668)(Y)(c) very clearly includes the following statement in the box.

> IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Column (e) referred to in the box above is listed on the NFTL as "Last Day For Refiling." Column (e) indicates that for the tax year ending 12/31/93 the last day for refiling was 05/31/05 and that for the tax year ending 12/31/94 the last day for filing was 07/05/05. That means if the Statue of Limitations is not extended by the last day for refiling, the lien and the assessment that it protects are lost and gone forever. [Complaint ¶ 8]

In addition to the fact that the NFTL operated as a certificate of release as defined in IRC 6325(a), the IRS voluntarily, on August 8, 2005, issued a Certificate of Release of Federal Tax Lien for tax years 1993 and 1994. [Complaint ¶ 8]

On **January 19, 2006,** Attorney Carmellino, Toothacre's representative, wrote a letter to

Revenue Officer Martinez, in which he advised her that in reviewing The San Diego Daily Transcript he discovered that, on **December 21, 2005,** the IRS caused to be recorded two Notices of Federal Tax Liens against Toothacre & Pedestrian (Sic) a Partnership. Neither Mr. Pederson nor Mr. Toothacre received any notice whatsoever of this action by the IRS. This event is, without doubt, the most convincing evidence that Revenue Agent Martinez abused her discretion and was intent on punishing Toothacre. Revenue Officer Martinez had previously been furnished by Toothacre Certificates of Release of Federal Tax Liens indicating that the NFTLs against the TOOTHACRE & PEDERSON law firm had been released. In fact, the last day for filing either of those documents was in ***2002.*** Attorney Carmellino's letter stated:

> I am enclosing copies of those Certificates of Release of Federal Tax Liens for your information, although Mr. Toothacre provided these to you by his previous letter. As indicated on the face of these documents the last days for refiling (CSED) were in 2002. As you know this is 2006. The collection statute has run. **The Collection Statute Expiration Date came and went over three years ago. You must be fully aware of these facts.**

Attorney Carmellino's letter further stated:

> **It is patently obvious that the refiling of these liens is malicious and an obvious attempt by the Service to bully my client and destroy his life. All of this in violation of your own Manual and the Taxpayer Bill of Rights. Mr. Toothacre is trying to pay those taxes which are due, and collectible, and you are making every effort to *thwart his attempts.*** (emphasis added)

A copy of Attorney Carmellino's letter dated January 19, 2006, together with the newspaper article and copies of the Certificates of Release of Lien are attached as Exhibit "1" to the Verified Complaint. Revenue Officer Martinez never replied to that letter nor did she reply, in writing to any letter written to her by Mr. Carmellino on Toothacre's behalf. Actually, Revenue Officer Martinez caused three Notices of Federal Tax Liens purportedly against the Toothacre & Pederson Partnership to be recorded. Two were recorded on December 22, 2005 and the third one was recorded on January 3, 2006. All three of these recordings were done more than three years after the previously recorded liens had self released and after all prior liens had been released by the issuance of Certificates of Release of Liens as above indicated. Attached to the Verified Complaint as Exhibit "7" are three Notices of Federal Tax Liens all bearing recording information of the San Diego County Recorders Office. Two of them were recorded on December 22, 2005, indicating that they had been prepared by A. Martinez, Revenue Officer at San Diego, CA, on the 21st day of December, 2005. They both purport to be against Toothacre & Pederson, a partnership and both reflect that the year of the date of assessment was 1992, more than 13 years prior to the date of recording. The third Notice of Federal Tax Lien also purports to be against Toothacre & Pederson, a partnership and was recorded on January 3, 2006 at the San Diego Recorders Office. It indicates that it was prepared by Susan A. Hansen, SPF Advisor, on the 21st day of December, 2005. It also indicates that the date of the year of assessment was 1992. [Complaint ¶ 9]

Further evidence of the fact that the subject Notices of Tax Liens had expired, both by their own terms by self releasing and also by voluntary act of the IRS, are two documents which were issued by the Lien Unit Manager of the Internal Revenue Service. Both of these documents are "Beneficiary Statements" or Pay Off Notices to be placed in Toothacre's refinance escrow. The first of the documents is dated August 5, 2005, and was addressed to Fidelity National Title Company % Natalie Drosi at 5060 Shoreham Pl. Ste. 130, San Diego, CA 92122. Ms. Drosi was/is the escrow officer handling Toothacre's refinance escrow. That document reflects all tax liens filed in San Diego County, CA and listed the tax liabilities for which there were filed liens. There is no mention of a lien for either tax year 1993 or tax year 1994. The total payoff figure was $147,528.16. The second document is dated September 3, 2005, issued by the Lien Unit Manager of the IRS and addressed to Rodney M. & Marcia L. Toothacre at the residence address. This document also was intended to be a beneficiary statement and it reflects a payoff figure of $90,504.31. The reduction from the previous pay off figure is accounted for by the fact that liens against the partnership TOOTHACRE & PEDERSON had been removed also both by self releasing and by action of the IRS in issuing Certificates of Release of Liens. The second document specifically states that the taxes for tax years 1993 and 1994 had been assessed, "but liens have not been filed". True and correct copies of both of these documents are attached to the Verified Complaint as Exhibit 2. These documents clearly establish that as far as the Lien Unit of the IRS was concerned, in August and September of 2005, there were no valid liens concerning tax years 1993 and 1994. [Complaint ¶ 10]

Revenue Officer Martinez intentionally and purposefully interfered with the pending refinance escrow by delivering to the escrow holder Notices of Federal taxes due in the total amount of $488,367.37, knowing full well at the time of delivery to escrow by Revenue Officer Martinez that some, if not most, of the taxes alleged to be due were uncollectible because the CSEDs (Collection Statute Ending Dates) had run. Revenue Officer Martinez took this action wilfully intentionally and with malice. One of the Notices of Federal Taxes due claimed taxes for the tax year 1992. Copies of the two notices which were delivered to the escrow holder are attached to the Verified Complaint as Exhibit " 3". [Complaint ¶ 11]

The original Notice of Federal Tax Lien, dated January 30, 1997, recorded in the San Diego County Recorder's Office on February 4, 1997, contains, on its face, the following information.

> **IMPORTANT RELEASE INFORMATION:** For each assessment listed below, unless a notice of the lien is refiled by the date given in column (e), this notice shall, the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Accordingly the Notice of Federal Tax Lien on May 31, 2005 and on July 5, 2005 became Certificates of Release and released the liens claimed. A true, correct and accurate copy of the original Notice of Federal Tax Lien is attached to the Verified Complaint as Exhibit 4 [Complaint ¶ 12]

In addition to the fact that those liens expired by their own terms, there were also Certificates of Release of Federal Tax Liens issued by the IRS on August 8, 2005, and recorded with the San Diego County Recorder. In spite of this knowledge Revenue Officer Martinez, maliciously, fraudulently and falsely told the escrow officer that the Certificates of Release of Federal Tax Liens were filed in error even though IRC § 63215(f) provides in part:

> Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:
>
> (A) in the case of a certificate of release, such certificate shall be ***conclusive*** that the lien referred to in such certificate is extinguished; (emphasis added) [Complaint ¶13]

In this case, after the Federal Tax Liens were extinguished by the Stature of Limitations, the IRS attempted to extend the liens. Toothacre does not contest the fact that the IRS can extend the life of NFTL before the expiration of the Statue of Limitations or before the "last day for refiling." However, in this case, the IRS attempted to extend the expired liens by filing Forms 12474-which are designed to apply to "Revocation of Certificate of Release of Federal Tax Lien." This Revocation was not filed according to law, but it halted the closing, which cost Toothacre a large amount of money. This revocation of Certificate of Release of Federal Tax Lien, whether by error or purposely to harass Toothacre, cost Toothacre a lot of money. The IRS never did file Form 12474-A which is intended for use when the IRS allows a Notice of Federal Tax Lien filed against the taxpayer to operate as a Certificate of Release of Federal Tax Lien. Accordingly, to this very moment, the IRS has made no attempt to revoke the Self Releasing Notice of Federal Tax Lien. The Revocation of Lien Releases are attached to the Verified Complaint as Exhibit 5. [Complaint ¶ 14]

Ms. Chadwell was the Settlement Officer (SO) or Appeals Officer (A) in connection with Toothacre's Collection Due Process Hearing and in her Case Activity Record Print Ms. Chadwell states on the second page:

> 3. Lien was released and the IRS issued a Certificate of Release. **The TP was not given timely notice of the lien filing.** The NFTL on the 1993 and 1994 years was not refiled timely so the a (sic) certificate of release of the NFTL was erroneously issued. IRC 6325(f)(2) gives the IRS authority to revoke the release and reinstate the lien or a new lien was filed under IRC 6323(f) so that the reinstated lien will be valid against any lien or interest in 6323(a). ***Per IRM new lien has to be filed after the notice of revocation is mailed to the TP and recorded.*** **The effective date of reinstatement is the date the IRS mails the notice of revocation to the TP but not before the date the notice is filed at the SDCR.** ***I will need a copy of the notice of revocation.*** **Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915.** ***Hopefully the notice of revocation was recorded and mailed to the TP before this date.*** **ALS shows 12/7/05 as 3172 date yet copy of 3172 shows 12/13/05. The difference may be due to fact RO manually filed lien. Also noted that lien filing date on notice is given as 12/06/05 when ALS and ICS shows the actual recording date to be 12/5/05. 5 business days after recording date is 12/12/05. IRC 6320(a)(2)(c)** Thus it can be argued that notice was issued one day late. However as far as I am concerned this is an administrative error that does not invalidate the NFTL. Based on wording in TPS appeal he claims that he was not notified with 5 business (sic).(emphasis added) (Case Activity Record is Attached hereto marked Exhibit "6" and made a part hereto by this reference as though set forth in full.) [Complaint ¶ 15]

The Internal Revenue Code is extremely complicated and complex. If the IRS has legal grounds to revoke the automatic release and the voluntary release, they should be required to show cause before this Court. The IRS must prove why the revocation forms should not be removed of record along with any other impediment imposed by the IRS.

Toothacre has given the IRS no grounds to extend the Statue of Limitations. This is entirely a matter of law as no facts are in dispute.

IV

PROCEDURAL HISTORY

On **December 5, 2007** plaintiff filed the instant Verified Complaint for Damages for Illegal Tax Collection and Injunctive Relief.

On or about January 9, 2008, the IRS withdrew the two liens against plaintiff's residence so the injunctive portion of the action became moot.

On or about February 26, 2008, this Court entered an order dismissing the portion of the Complaint seeking injunctive relief.

On or about February 28, 2008, defendants filed the instant motion to dismiss, erroneously asserting plaintiff failed to exhaust remedies and otherwise failed to state a claim upon which relief can be granted.

V

ARGUMENT

A. This Court Has Subject Matter Jurisdiction Because Plaintiff Exhausted His Administrative Remedies by Providing Defendants With Notice Pursuant to 28 USC § 2675(a)

Persons injured by acts or omissions of federal employees acting in the course and scope of their employment may sue the United States. [See 28 U.S.C. §§ 1346, 2671-80]

The Federal Tort Claims Act (FTCA) requires persons with tort claims against the federal government to file the claim with the appropriate federal agency so that it will have an opportunity to resolve the claim. No action may be filed in district court until the claim has been denied (or the agency has failed to act on the claim within six months after it was filed. [See 28 USC § 2675(a)] This administrative claim prerequisite is jurisdictional and must be followed. [*Jerves v. United States* (9th Cir. 1992) 966 F2d 517, 519.]

The claim requirement is satisfied by giving the agency sufficient notice to commence investigation. This requires no more than "a skeletal claim form, containing only the bare elements of notice of accident and injury and a sum certain representing damages..." [*Shnipek v. United States* (9th Cir. 1985) 752 F2d 1352, 1354]

On April 6, 2006, plaintiff served a letter titled "NOTICE OF INTENT TO SUE THE

UNITED STATES OF AMERICA" on the Internal Revenue service-Area Director. That notice is six single spaced pages in length and goes into great detail regarding plaintiff's claims. The notice concludes:

> As indicated at the beginning of this letter the primary purpose is to properly serve notice on the United States of America of my intent to sue for all damages incurred, including but not necessarily limited to compensatory damages and general damages for emotional distress. This notice is pursuant to IRC § 7432. As noted above, repeated requests and demands have been made to the IRS to remove the wrongful liens and not only has the IRS failed and refused to remove the illegal liens, it has virtually refused to answer any of the taxpayer's, or his representative's, correspondence at all. ... ***If for any reason this letter fails to meet the requirements of notice the government, please advise the undersigned."***

A copy of the NOTICE OF INTENT TO SUE THE UNITED STATES OF AMERICA is attached to the Declaration of Angela Martinez as Exhibit L.

On May 16, 2006, plaintiff filed an "AMENDMENT TO NOTICE OF INTENT TO SUE THE UNITED STATES OF AMERICA". That document sets forth a sum certain plaintiff was seeking in his action against the United States. That documents concludes: ***"Again I ask that if for any reason this letter fails to meet the requirements of notice to the government under the FTCA, please advise the undersigned.***" A copy of the AMENDMENT TO NOTICE OF INTENT TO SUE THE UNITED STATES OF AMERICA is attached to the Declaration of Angela Martinez as Exhibit L.

The government never notified plaintiff of its contention that his notice of intention to sue was in any way defective. Instead, a year and a half later, the IRS denied plaintiff's administrative claim for damages. (Complaint ¶ 6) That letter states"*You have two years from the date of the action you believe caused your damages to file your case with the court."* A copy of the letter dated November 7, 2007, along with the hand addressed envelope in which it was delivered is attached to the Declaration of Rod M. Toothacre as Exhibit A.

B. Plaintiff States A Valid Claim Upon Which Relief Can be Granted Under 26 U.S.C. § 7432

Under section 7432, a taxpayer may bring a suit for damages if "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. § 7433. Under this provision, damages are limited to the "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee. . ." 26 U.S.C. § 7433(b). Also compensable are injuries such as inconvenience, emotional distress and loss of reputation to the extent that the result in pecuniary damages. Treas. Reg. § 301.7433-1(b)(1).

Defendant asserts that plaintiff has failed to plead any actual pecuniary damages and therefore, the complaint must be dismissed.

Under 26 U.S.C. § 7432, damages may be recovered for the "actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained." 26 U.S.C. § 7432. "Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages." Treas. Reg. § 301-7433-1(c)(1).

Plaintiff has plead that the actions of the IRS interfered with and prevented funding of a pending escrow which cost plaintiff a lot of money. [Complaint ¶ 14] Further plaintiff has plead that he is suffering irreparable harm due to the ability to refinance his residence, pay the undisputed taxes and perform necessary repairs to his residence. [Complaint ¶ 21] Plaintiff is entitled to recover his economic damages and damages for the inconvenience, emotional distress and loss of reputation occasioned by the IRS's illegal activities.

Even if defendant is correct, the Court should not dismiss the Complaint but grant leave to amend to plead the actual economic damages which resulted from the IRS' improper conduct.

C. Plaintiff States A Valid Claim Upon Which Relief Can be Granted Under 26 U.S.C. § 7433

Under section 7433, a taxpayer may bring a suit for damages if "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. § 7433. Under this provision, damages are limited to the "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee. . ." 26 U.S.C. § 7433(b). Also compensable are injuries such as inconvenience, emotional distress and loss of reputation to the extent that the result in pecuniary damages. Treas. Reg. § 301.7433-1(b)(1).

Defendant erroneously asserts that plaintiff has failed to plead any actual pecuniary damages and therefore, the complaint must be dismissed.

Under 26 U.S.C. § 7432, damages may be recovered for the "actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained." 26 U.S.C. § 7432. "Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages." Treas. Reg. § 301-7433-1(c)(1).

Plaintiff has plead that the actions of the IRS interfered with and prevented funding of a pending escrow which cost plaintiff a lot of money. [Complaint ¶ 14] Further plaintiff has plead that he is suffering irreparable harm due to the ability to refinance his residence, pay the undisputed taxes and perform necessary repairs to his residence. [Complaint ¶ 21] Plaintiff is entitled to recover his economic damages and damages for the inconvenience, emotional distress and loss of reputation occasioned by the IRS's illegal activities.

Even if defendant is correct, the Court should not dismiss the Complaint but grant leave to amend to plead the actual economic damages which resulted from the IRS' improper conduct.

VI

CONCLUSION

For all the foregoing reasons, defendant's motion to dismiss plaintiff's claim must be denied. Should the Court agree with any contention raised by defendant, plaintiff respectfully requests leave to amend the Complaint.

Respectfully submitted,

Dated: April 30, 2008

[signature]
Rodney M. Toothacre, Plaintiff In Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Toothacre v. United States of America — Case No. 07-cv-2289-DMS-WMC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSITION TO MOTION TO DISMISS; DECLARATION OF RODNEY M. TOOTHACRE IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS; was this date served upon all counsel of record by placing a copy of the same in the United States Mail, postage prepaid, and sent to their last known address as follows:

Caroline A. Newman, Trial Attorney
Tax Division
U.S. Department of Justice
Post Office Box 683
Ben Franklin Station
Washington, DC 20044-0683
(By Overnight Mail)

Karen P. Hewitt
United States Attorney
880 Front Street, Room 6293
San Diego, California 92101
(By Regular Mail)

San Diego, California, this 1st day of May, 2008.

Debra L. Barker for
Rodney M. Toothacre, In Pro Se